A HISTORICAL SKETCH OF MOHAMMEDAN JURISPRUDENCE.[1]

I. Early Customary Law.

The Mohammedan Jurisprudence is part of a more comprehensive science which is known as the "Principles of Fiqh" (Usúlu-l-Fiqh[2]) and which in the wideness of its range closely approaches Ulpian's old definition of Law as "the knowledge of things human and divine, the science of the just and unjust." Law, as is well-known, has never been separated in the Mohammedan system from the domain of religion, and in theory at all events no line of demarcation can be drawn between civil law and canon law. Both are of the same divine origin. The notions of legal rights and legal wrongs are generally speaking dominated by considerations of spiritual merit or demerit. A Muslim in making a gift of his property by will, or waqf, is moved by the expectation of a spiritual reward, as he is when fasting during the month of Ramadhán. By wilfully omitting to say his daily prayers he becomes liable to the penalties of Law just like a man who has committed an offence against his neighbor's property. Only the nature and the measure of punishment differ. The Qádhi is not only a judge but an ecclesiastical authority. The same canons of interpretation and analogical deduction apply to a text relating to ablutions and to a text relating to testamentary dispositions of property. The unity of the system itself being so rigid it is only natural that in the original authorities dealing with the 'Principles,' discourses on the canon and the civil laws should be intermixed. Analogies from the realms of theology are at every step, we find, brought into requisition in order to enlighten a question of law and *vice versa*. The connection between the two is indeed so intimate that it has been hitherto deemed necessary that in order to master the principles of Jurisprudence one must possess a considerable acquaintance with the doctrines of Mohammedan theology. A process, therefore, by which the Mohammedan Jurisprudence is to be treated more or less as a separate science, as required, may be considered artificial; but it is no doubt amply called for by circumstances of necessity.

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[1] By permission of the Calcutta Law Journal.

[2] *Usúl* lit. means 'roots,' and *Fiqh* 'understanding' or 'knowledge.'

It will not however be possible in the course of this discussion to abstain altogether from references to the principles of theology, but matters that are solely or mainly connected with that subject, and but indirectly and remotely bear upon Jurisprudence, will be excluded from our view, and, where that is not feasible, be at least kept in the background. For the same reason it will be also necessary while discussing a theory of Jurisprudence to draw the illustrations and arguments as far as practicable from the department of law alone. Further, the Arabic writers in dealing with the principles of interpretation of the texts devote, as it seems, an undue space to the consideration of the meaning of certain Arabic particles, such as *ilá, an, min.* Such discussion falls more appropriately within the purview of the grammarian, and will hardly be of use to those who are not presumed to know that language. It will, therefore, be avoided except in the case of such words that have acquired a technical significance and effect. In another respect of greater importance it is proposed to make a deviation from the usual mode of treatment adopted by the Arabic text-writers. They divide the Science of Law into two parts, Usúl or Principles (*lit.* roots) and Furú' or Conclusions (*lit.* branches). The writers on the 'Principles' devote their attention mainly to the discussion of questions relating to the conception of right and wrong, the nature and scope of a command, the sources of law, and the canons of interpretation; but they relegate to the background or leave out as more properly falling within the province of those concerned with the second division of the subject, the consideration of juridical ideas governing family relations, status, ownership, devolution and transfer of property and the like. This peculiarity may also be due to the standpoint from which they approach the subject, but as the utility of a discourse such as this would be otherwise seriously impaired it is proposed to deal with these questions as well, with special reference to the topics that come within the purview of the British Indian Courts.

In the first part of this paper a brief sketch will be given of the customary law and usages in vogue among the Arabs at the time of the promulgation of Islam. The importance of its bearing on the study of Mohammedan Jurisprudence should be obvious, though strange to say the subject has either been ignored or has received but scanty and random notice at the hands of the writers on Mohammedan Law. The information on this point, such as is available, has been collected from various his-

torical works, commentaries on the Qur'án and the Hadíth, biographies and other books, and will, it is hoped, throw light on many points hitherto regarded as the dark corners of Mohammedan Law. Alterations and modifications have been made in the customary law by Islam; but the groundwork remains the same, and even most of the legal expressions of the pre-Islamic Arabs have been embodied, as will be seen, in the Mohammedan Jurisprudence. It would be wrong to suppose that Islam professed to repeal the entire customary law of Arabia, and to supplant it with something altogether new, for such is not the fact. It is stated in Sabá'iku-dh-Dhahab,[1] "The Arabs had their own laws which they followed, and Islam maintained some of them and repealed others * * *. Their custom forbade marriage with the mother and the daughter: this was maintained. They used to disapprove of a man marrying the widow of his father, (and Islam forbade this altogether). The practice of cutting the right hand of the thief prevailed among them, and Islam upheld this." Hidáyah in establishing the validity of a partnership says, "Partnership is lawful because the Prophet found people practising it and confirmed them therein."[2] In commenting on this passage Fathu-l-Qudír says, "There is a much stronger argument in favour of legality of partnership than certain traditions (of the nature of Ahád) quoted from Abú Dá'úd and Ibn Májah, namely, continuous practice among men from the time of the Prophet."[3] In Tafsír-i-Ahmadi,[4] it is laid down, "We hold 'lawfulness' to be the fundamental principle and 'unlawfulness' to be equivalent to abrogating; because in the interval of time between Jesus Christ and the Prophet, 'lawfulness' was the original attribute of human actions, and when the Prophet came he declared some acts to be unlawful and maintained others in their previous condition." The description of the customs of the Arabs will be followed by a succinct review of such of the principles of Mohammedan Law as were established during the life-time of the Prophet—called the 'legislative' period of Islam—by the Qur'án and by his precepts (Hadíth). These form the main foundation and primary sources of the Mohammedan Jurisprudence, and upon them the supertsructures of the four Sunni schools have been constructed.

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[1] Lithographic edition, Baghdad, page 102.
[2] Delhi edition, Vol. II., page 599.
[3] Cawnpore edition, Vol. II., page 830.
[4] Bombay edition, page 18.

The second period extends from the date of the Prophet's death to the foundation of different schools of Jurisprudence, and would cover, roughly speaking, the time of the Companions of the Prophet (Sahábah) and their successors (Tábi-ún). In the history of Mohammedan Law it was an age of collection and interpretation and partly supplementing the Qur'ánic and traditionic laws by means of *ijma'* (consensus of opinion).

The third period is that of the Science of Jurisprudence properly so called, commencing from the establishment of the four Sunni schools until the completion of their work. A short historical account of the last two periods will be given in order to trace the chief elements in the growth and development of Mohammedan Jurisprudence. This will enable the reader to keep in view the principal ideas in the Mohammedan Science of Law, and make it easier for him to follow the processes of theorization elaborated by the leading Jurisconsults.

The constitution of Arab society, when the laws of Islam came into force, was that of a people which had not yet, generally speaking, completely lost its nomad habits and characteristics. The Arabs were divided into tribes and sub-tribes, and these latter again into families. They were often at hostilities with each other, and on such occasions there was no recognized usage or general public opinion restraining the actions of the members of one tribe towards those of the other. But for some time a number of tribes had united together by compact for the purposes of offence and defence, and this had the effect of ensuring peace for a sufficient length of time to allow for the growth of law. Such was specially the case in large cities like Mecca and Medina. Mecca, which was the place of pilgrimage, contained a large and powerful population composed of several tribes bound together by ties of kinship and interest. These two cities and some seaport towns were centers of busy trade, and the merchandise of at least some parts of Asia passed through them to Europe. We also find that marts used to be held at different places almost the entire year round. Besides the town populations there were the Arabs of the desert known as the Bedouins. They led a roving life, removing their tents as time and opportunity offered from place to place. Each of these tribes had no doubt its own peculiar usages. Our account is mostly concerned with customs that prevailed among the inhabitants of the principal cities, but the general characteristics of the customary law of the populations of the towns and of the desert did not differ in essentials. Only

the one tended to a more settled form than the other. The bulk of the Arab population were idolators, but there were some among them who had adopted Christianity, and some were Magians in religion. A large and influential community of Jews had for a long time settled in Medina with their own laws and usages, and also in southern Arabia. How far they influenced the customary law of the Arabs must to a great extent be a mere matter of conjecture, but that on some points it bears features of resemblance to the Rabbinical code will be apparent.

The Arabs of Arabia at the time of the Prophet had no certain constitution and nothing like settled form of Government, whatever might have been the condition of things previously. Each tribe elected its own chief. He was generally a man who, by his nobility of birth, age and reputation for wisdom, had won the confidence and respect of his fellow-tribesmen. His most important function was to represent his tribe in its relations with the other tribes. Sometimes he was assisted in the discharge of his duties by a Council of Elders. Within the limits of his tribe his orders and decisions were enforced, not by any fixed machinery at his disposal, for properly speaking there was no constituted State, but by the force of tribal opinion. Sometimes it happened that the culprit belonged to a powerful family, and his kinsmen would refuse to surrender him to the chief of the tribe for punishment. That family would then break away and join another tribe and become their *Ahláf* (sworn allies). If the culprit alone escaped and took refuge with a rival tribe he would be called *Dakhíl* (*lit.* one that has entered).

In Mecca, however, things were tending towards the formation of a government. The tribes that composed the non-migratory population of that city had in their custody the Ka'bah, which was a place not only of public worship but of many social and political ceremonials. The public offices were divided among the twelve principal tribes or families. Of these the office of deciding disputes was delegated to one tribe and used to be exercised by its chief. The duty incidental to another important office was, for the chief who held it, to pay from his own pocket fines and compensations for wrongs committed by any of his tribesmen towards a member of another tribe. Abú Bakr, who afterwards became the first Caliph in Islam, held this office for some time.[1]

If a member of one tribe killed a member of another tribe,

[1] Táríkhu-l-Khulafá', Delhi edition, p. 21.

no distinction being made whether it was wilful or otherwise, the heirs or chief of the tribe of the deceased were entitled to demand that the offender might be given up to them to suffer death. But the matter might be compounded by payment of a fine or compensation amounting to a hundred camels. If the two tribes happened to be at amity with each other, and the person accused denied the charge, then on a number of men belonging to his tribe pledging their oaths to his innocence the matter would be dropped. A case is reported in *Al-Bukhárí*[1] which is important as illustrating the custom of the Arabs in this connection. A man of the family of Banú Háshim was hired by a man called Khadish belonging to another branch of the tribe of Quraish to go with him to Syria in charge of his camels. On the way, because the hired man had given away a tether rope to a passer-by without his master's knowledge, the latter in rage threw a stick at him which, happening to strike the man in a vital part, proved the cause of his death. But before he died a man of Yaman happening to pass that way, he requested him when he would go to Mecca to tell Abú Tálib, the chief of his family, how he had been killed by his employer for the sake of a tether rope. When the employer afterwards returned to Mecca, Abú Tálib enquired of him what had happened to his man, and he said that he had sickened on the way and died. Subsequently, however, the man of Yaman, who had been charged with the message by the deceased, came to Mecca and communicated the same to Abú Tálib. The man who had engaged the deceased was then making the circumambulation of the Ka'bah. A member of the family of Banú Háshim went up to him and struck him saying, "You have killed one of our men;" but Khadish denied the charge. Abú Tálib next went up to the man and said, "Choose at our hands one of three things: If you wish, give a hundred camels for the murder of our kinsman, or if you wish, get fifty of your tribesmen to swear that you have not killed him. If you refuse either of these we will kill you in his place." But according to Zubair ibn Bakkar, both the parties referred the case to Walid Ibnu-l-Mughí-rah, who decided that fifty men of Banú Amir—the family of the man charged—should swear before the Ka'bah that Khadish had not killed the man. Khadish spoke to his kinsmen, and they said that they would swear that he had not killed him. Then a woman of Banú Háshim, who was married to a man of Banú Amir and had borne him a son came

[1] Delhi edition, Vol. I., p. 542.

to Abú Tálib, and requested him to accept her son as one of the fifty and forego his oath. Abú Tálib acceded to her request. Next a man of the family of the accused person came to Abú Talib and said, "You want fifty men to swear in lieu of payment of a hundred camels, so it comes to two camels for every man's oath. Take from me two camels and do not insist on my taking the oath at the place where oaths are taken." Abú Tálib accepted the two camels, and forty-eight men came and took the oath.

An oath was held in great reverence, not merely as an inducement to speak the truth, but it was regarded in the nature of an ordeal finally settling the dispute. Much solemnity was attached to the ceremony of administering it, and a place called Hatim (*lit.* one that destroys, referring to the belief that a man taking a false oath would be destroyed by the deities) was set apart just outside the Ka'bah for this purpose. The exact form of the oath is not known, but it appears that the pre-Islamic Arabs used to swear by Hubal, their chief Deity, or by their ancestors, and at the end of the ceremony would throw down a whip or sandals or a bow as a token that they had taken a binding oath.[1]

The procedure that used to be adopted when a dispute or claim had to be decided was to call upon the plaintiff to adduce proof in support of his claim. If he had no witnesses, the defendant, in case he denied the charge, would be given the oath, and if he took it he would be absolved thereby from all liabilities. Sometimes the parties would gó to a diviner, and abide by his decision. If a suspected person was a slave, torture was sometimes resorted to in order to extort a confession.[2]

The principle of punishment for all crimes against the person was retaliation commutable to a payment of blood-money or compensation for the injury. If the injury resulted in death the loss caused was regarded as a loss to the tribe or family of the deceased, and it was their right to demand satisfaction from the tribe or the family of the offender. This would often assume the form of vendetta. We also find that the doctrine of retaliation underwent modifications according to the relative positions of the families of the parties. If a member of an inferior tribe killed a member of a nobler tribe, the latter would exact the blood of two men in lieu of one, of a male in lieu of a female, of a freeman in the place of a slave.[3]

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[1] Qastalání, Búláq edition, Vol. VI., p. 176 and p. 182.
[2] Id., p. 176.
[3] Tafsír-i-Ahmadi, p. 57.

Of the other forms of punishment that prevailed among the Arabs, it appears that they used to cut off the right hand of the thief. Among the Jews of Medina an adulterer used to be stoned to death if he was poor, but latterly they punished the adulterer, rich or poor, by blackening his face and flogging him.[1]

The customs regulating the relations of the sexes and the status of the children, issue of such relations, were at the time of the establishment of Islam uncertain and in a state of transition. Side by side with a regular form of marriage which fixed the relative rights and obligations of the parties and determined the status of the children, there flourished types of sexual connection under the name of marriage which are instructive as relics of the different stages through which the Arabian society must have passed. It is narrated that there were 'four kinds of marriage' in vogue at the time when the Islamic laws came into force. "(1) The form of marriage which has been sanctioned as such by Islam *viz.*; a man asks another for the hand of his ward or daughter, and then marries her by giving her a dower. (2) A custom according to which a man would say to his wife, 'Send for so and so (naming a famous man) and have intercourse with him.' The husband would then keep away and not touch her until she had conceived by the man indicated; but after her pregnancy became apparent he would return to her. This originated from a desire to secure noble seed. (3) A number of men less than ten used to go to a woman, and have sexual connections with her. If she conceived and was delivered of a child she would send for them, and they would be all bound to come. When they came and assembled the woman would address them saying, 'You know what has happened. I have now brought forth a child. O so and so! (naming whomsover of them she chose) this is your son.' The child would then be ascribed to him, and he was not allowed to disclaim its paternity. (4) A large number of men used to visit a woman who would not refuse anyone. These women were prostitutes, and used to fix at the doors of their tents a flag as a sign of their calling. If a woman of this class conceived or brought forth a child the men that frequented her house would be assembled, and physiognomists used to decide to whom the child belonged."[2] Of the above, the first form of marriage must have been of the latest growth, and apparently it is a mere contradiction in terms to call the rest examples of different forms of marriage.

[1] Kashfu-l-Ghummah, Vol. II., p. 105.
[2] Id. Vol. II., p. 56.

It admits of no doubt that the Arabs used to contract what has been called a temporary marriage under the name of Mut'ah. It is stated in Fathu-l-Qadír:[1] "When a man came to a village and he had no acquaintance there (to take care of his house) he would marry a woman for as long as he thought he would stay, so that she would be his partner in bed and take care of his house."

In the regular form of marriage the fixing of Mahr, or dower, for the benefit of the wife was in vogue among the pre-Islamic Arabs. It formed a part of the marriage contract, but in some cases the guardian of the girl used to take the dower himself.[2] Whether such an appropriation was a mere violation of the ordinary usage or whether it showed that dower was originally the price paid for the bride to her parents and that the payment to her was but a later development, can only be a matter of conjecture. At all events, at the time of the Prophet, dower was regarded as a constituting element of the marriage contract, and the right of the wife. Its payment was enforced by the voice of public opinion or the power of the woman's relatives, in the event either of a divorce or the death of the husband, unless it had been paid at the time of the marriage. A device used at times to be resorted to under the name of *shighár* marriage[3] in order to deprive the wife of her dower. A man would give his daughter or sister in marriage to another on condition that he would give his daughter or sister in marriage to him. In such a form of marriage neither of the wives would get a dower. Unchastity on the part of the wife made her liable to the forfeiture of her dower. Frequently a false charge used to be brought against the wife by the husband, so that he might get rid of her without paying the dower.[4] But many a time a divorced wife or a widow would be coerced to give up her claim to dower or to restore it if it had been already paid.

Before Islam a woman was not a free agent in contracting marriage. It was the right of her father, brother, cousin, or any other male guardian to give her in marriage, whether she was old or young, widow or virgin, to whomsoever he chose. Her consent was of no moment. There was even a practice prevalent of marrying women by force. This often happened on the death of a man leaving widows. His son or other heir would immediately

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[1] Vol. II., p. 34.
[2] Tafsír-i-Ahmadi, p. 226.
[3] Kashfu-l-Ghummah, Vol. II., p. 52.
[4] Tafsír-i-Ahmadi, p. 257.

cast a sheet of cloth on each of the widows (excepting, of course, the natural mother) and this was a symbol that he had annexed them to himself. If a widow escaped to her relatives before the sheet was thrown over her, the heirs of the deceased would refuse to pay the dower. This custom is described as the inheriting a deceased man's widows by his heirs, who used in such cases to divide them among themselves like goods.[1]

There was no restriction on the number of wives an Arab could take. The only limit was that imposed by his means, opportunity and inclinations. Unrestricted polygamy was sanctioned by usage and universally prevalent.[2] This was exclusive of the number of slave-girls which a man might possess.

The limits of relationship within which marriage was prohibited were narrow and defined only by close degrees of consanguinity. There can be no doubt that an Arab could not marry his mother, grandmother, sister, daughter or granddaughter and perhaps he was not allowed to marry his aunt, or niece. But those among them that followed the Magian religion could marry their own daughters and sisters. An Arab was permitted to take as his wife his step-mother, cousin, wife's sisters, and could combine in marriage two sisters and the aunt, and the niece.[3] It is doubtful whether he could marry his mother-in-law, daughter-in-law or step-daughter.

Unrestrained as an Arab was in the number of his wives, he was likewise absolutely free to release himself from the marital tie. His power in this connection was absolute, and he was not required or expected to assign any reason for its exercise, nor was he under the necessity of observing any particular procedure. The word commonly in use for this purpose was *talâq*. It depended upon his discretion whether he would dissolve the marriage absolutely, and thus set the woman free to marry again, or not. He might, if he so chooses, revoke the divorce and resume marital connection. Sometimes an Arab would pronounce *talâq* ten times and take his wife back and again divorce her, and then take her back, and so on.[4] The wife in such a predicament was entirely at the mercy of the husband, and would not know when she was free. Sometimes the husband would renounce the wife by means of what was called a suspensory divorce.[5] This

[1] Tafsír-i-Ahmadi, p. 256.
[2] Id., p. 223.
[3] Kashfu-l-Ghummah, Vol. II., p. 45.
[4] Tafsír-i-Ahmadi, p. 130,
[5] Id., p. 121.

procedure did not dissolve the marriage, but it only enabled the husband to refuse to live with his wife while the latter was not at liberty to marry another. Another form of divorce in use among the Arabs was *Ilá'*, the husband swearing that he would have nothing to do with his wife.[1] According to some, such an oath had the effect of causing an instant separation, but others say that it was regarded as a suspensory divorce. Sometimes when an Arab wanted to divorce his wife he would say that she was like the back of his mother. This would have the effect of an irrevocable divorce and was known as *Dhihár* (from *Dhahr* back).[2]

The wife among the Arabs had no corresponding right to release herself from the bond of marriage. But her parents by a friendly arrangement with the husband could obtain a separation by returning the dower, if it had been paid, or by agreeing to forego it, if not paid. Such an arrangement was called *khul'* (*lit.* stripping), and by it the marriage tie would be absolutely dissolved.

A woman, if absolutely separated by *Taláq*, *Dhihár*, *Ilá'* or *Khul'* might re-marry, but she could not do so until some time, called the period of *'Iddah'* had elapsed. This precaution was evidently observed in the interest of the child that might be in the womb. But an Arab before Islam would sometimes divorce his pregnant wife, and she would under an agreement with him, be taken over in marriage by another. On the death of the husband the period of *'Iddah'* was one year.

The status of a child was determined not merely by marriage, but also, as may be gathered from what has preceded, by other forms of sexual relations. Regarding the issue of a regular form of marriage, no doubt was entertained as to the establishment of the descent of the child from the husband of its mother. In the other cases, as we have seen, it was the right of the mother of the child to affiliate it to any one with whom she had sexual connection. Adoption among the Arabs was also in vogue as a legitimate mode of affiliation. Whether any form or ceremony was observed at the time of adoption is not known, but it seems that it was generally effected by a contract with the parents of the boy. The right to adopt was not based on any fiction, and it was not restricted by any condition as to the age of the adopted child, or the absence of a natural born son to the adoptive father. The

[1] Tafsír-i-Ahmadi, p. 122.
[2] Id., p. 610.

adopted son passed into the family of his adoptor and assumed his name; and his rights and disabilities were the same as those of a natural born son.[1] In proportion to his eagerness to have a son, an Arab father regarded the birth of a daughter as a calamity, partly at least because of the degraded status of women. Even at the time of the Prophet female infanticide was prevalent, and many fathers used to bury their daughters alive as soon as born.

The property of an Arab generally speaking was of a simple description. Camels, cattle, tents, clothes and a few utensils usually composed the bulk of his possessions. The use of money had been known to him for some time, and slaves were a common and valuable form of property. In towns there were properly-built houses and shops, and land had value. Proprietorship was individual, and the principle of a joint family, with reference to the holding of property, was unknown. No distinction was made between ancestral and self-acquired, movable and immovable property. Except the places of worship there was hardly any public property. With the exception of a slave who himself was the property of his master, the Arab customary law recognized the right of every one to hold property. Though a woman, as we shall see, was debarred from inheriting, she was under no disability in this respect. Anything that she might receive from her husband as dower or by gift from him or her parents and relatives was absolutely hers. Sometimes women acquired riches by trade and commerce and some of them were owners of land and houses. But neither her person nor her possessions were safe unless she was under the protection of her parents or some male relatives or husband. If, however, her protector proved rapacious or dishonest, she hardly had any remedy. The position of an infant or a *non compos mentis* was still worse, and the customary law of the Arabs provided no protection to him from the dishonesty of his guardian.

An Arab owner had an absolute power of disposal over his property. He could by an act *inter vivos* alienate his entire interest by a sale or gift or only a partial or limited interest by lending, pledging or leasing. Under the name of sale he enjoyed a perfect freedom of contract. Some of these transactions were purely speculative and even of a gambling nature. The following list of the different kinds of sale[2] in vogue among the pre-

[1] Tafsír-i-Ahmadi, pp. 610 and 611.

[2] See Hidáyah, Vol. III, pp. 56, 57; and Kashfu-l-Ghummah, Vol. II., pp. 6 and 7.

Islamic Arabs will not only serve to explain many of the principles of transfer of property established by the Mohammedan jurisprudence, but cannot fail to be of interest as showing that the Arabs at that period had begun assigning names to different forms of transactions and drawing distinctions between them, however superficial in some cases,—always a commencement of the science of law.

1. Sale of goods for goods called *Muqáyadhah* being an exchange or barter.

2. Sale of goods for money, *Bai*, a form of sale commonly in use.

3. Sale of money for money, *Sarf*, or money-changing.

4. Sale in which the price was paid in advance, the article to be delivered on a future date: this sale is called *Salam.*

5. Sale with an option to revoke.

6. An absolute or irrevocable sale.

7. Sale of goods, the price to be paid in future.

8. *Murábahah*, a transaction in which the vendor sells the article for the cost price and certain stated profits.

9. *At-Tauliyah*, sale at the cost price.

10. *Wauhí'*, sale at less than cost price.

11. *Musáwamah*, sale by bargaining.

12. Sale by throwing a stone. Several pieces of cloth, for instance, being exposed for sale, the buyer throws a stone and whichever piece it falls upon becomes the property of the buyer, neither party having the option of revoking the sale.

13. *Mulámasah.* In this form of sale the bargain was concluded by the buyer touching the goods which at once became his property whether the vendor agreed to the price or not.

14. *Munábadhah*, a sale in which the shop-keeper would throw an article towards the intending buyer, this having the effect of completing the sale.

15. *Muzábanah.* Sale of dates on a tree in consideration for plucked dates.

16. *Muháqalah.* Sale of wheat in the ears or of a fœtus in the womb.

17. *Mu'ámalah* or *Bai'u-l-wafá'*. In this form of sale the vendor of the article says to the buyer, "I sell you for the debt which I owe you on condition that when I repay the debt you will give back the article to me." The buyer, however, could not make use of the article without the vendor's permission.

18. A form of sale called two-bargains-in-one in which the

condition was that the buyer should sell the article back to the vendor within a stated period.

19. *'Urbún.* In this sale the purchaser pays a portion of the price to the vendor stipulating that if he approved of the article he would pay the balance, otherwise he would return it, and the amount paid by him would be forfeited.

20. A sale, in which the subject-matter was not in possession of the vendor at the time of the contract, but which he was to secure afterwards in order to fulfil the contract.

A lease of land used to be granted generally for the term of a year, but sometimes though rarely for two or three years. There is no record of a lease for a long term. The rent was paid either in money or part of the produce or wheat. Sometimes it used to be a condition of the lease that the lessor should supply the seed for cultivation, and sometimes that it should be supplied by the lessee. In the former case the tenure was called *mukhábarah* and in the latter *muzára'ah.* Sometimes the stipulation used to be that the lessee should cultivate the land with seed found by himself, and the lessor would have for his share the crops that would grow on the portion adjoining the stream or on some other specified plot. The Arabs used also to farm out the fruit trees.[1]

The Arabs used to lend out money on interest, and at least among the Jews of Medina usury was rampant under the name of ribá[2]. Loans of articles by way of accommodation were designated *Ariyahs,* the borrower in this form of contract enjoying the use and income without consuming or disposing of the substance.

An Arab's capacity to dispose of his property by will was as full as his power to deal with it by acts *inter vivos.* He was not limited in making testamentary dispositions to any proportion of his possessions nor to any particular description of property. He could make the bequest in favor of any one he chose, and there was nothing to prevent him from giving away his entire property to some rich stranger, leaving his own children, parents and kindred in want. Or if he chose he might give preference to one heir to the exclusion of others.[3]

On the death of an Arab his possessions, such as had not been disposed of, devolved on his male heirs capable of bearing arms, all females and minors being excluded.[4] The heirship was deter-

[1] An-Nawawí's Commentary on the Sahíh of Muslim, Buláq edition, Vol. VI., pp. 405, 407, 406, 401.
[2] At-Tafsíru-l-Kabìr, Egyptian edition, Vol. II., p. 357.
[3] Tafsír-i-Ahmadi, pp. 60 and 61.
[4] Id., p. 234.

mined by consanguinity, adoption or compact. The first class consisted of sons, grandsons, father, grandfather, brothers, cousins, uncles and nephews. The sons by adoption stood on the same footing as natural born sons. The third class of heirs arose out of the custom by which two Arabs used to enter into a contract that on the death of one of them, the surviving party to the contract would be an heir to the deceased or receive a certain fixed amount out of the estate. The shares of the different heirs in the heritable estate were not fixed, and it is not easy to ascertain what was the order of succession among them, if any. It appears that the chief of a tribe used to divide the estate of a deceased person among the recognized heirs, and possibly the shares allotted varied according to the circumstances. If there were grown-up sons they probably excluded all others including the parents. All females being excluded, daughters, wives, sisters and mother did not inherit at all, but the estate was considered liable for the payment of the widow's dower and among some tribes at least, for her maintenance.

ABDUR RAHIM, ESQ., M.A.